subsequent suit. *See, e.g., Brown v. Felsen*, 99 S.Ct. 2205, 2209, 442 U.S. 127, 131 (1979). Yet there is no established rule for how the federal courts should determine what constitutes the "same cause of action." *See* 82 A.L.R. Fed. 829, § 2. This Court has never resolved the question, and it should grant the writ to do so now.

The traditional rule of *res judicata* can be translated from Latin in a legal context as "a matter adjudged" or "a thing adjudicated." *See id.* at § 1. The rule rests on the ground that once a party has litigated, or had the opportunity to litigate, the same matter in a court of competent jurisdiction, that party or its privy should not be permitted to litigate it again to the harassment and vexation of its adversary. *See id.* The rule is necessary to maintain an efficient judicial system that renders final judgments with certainty. It further prevents the inequality of a party's having to litigate the same claim or issue of law repeatedly. As explained by this Court in *Federated Dept. Stores, Inc. v. Moitie*, the doctrine of *res judicata* is "a rule of fundamental and substantial justice, of public policy and private peace, which should be cordially regarded and enforced by the courts." 101 S.Ct. 2424, 452 U.S. 394 (1981).

In diversity cases, this Court has concluded a federal court is bound to apply the *res judicata* principles that the state courts in the state in which the federal diversity court sits. *See Semtek Intern. Inc. v. Lockheed Martin Corp.*, 121 S.Ct. 1021, 531 U.S. 497 (2001). But in federal question cases, such as this one, the *res judicata* question is controlled by federal common law. *See Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 91 S.Ct. 1434, 402 U.S. 313, 324, n.12 (1971). Yet despite the vital importance of the *res judicata* doctrine, the scope of what

does and does not constitute the "same cause of action" in the federal common law has never been resolved by this Court. Instead, the lower courts have been left to apply a variety of tests that attempt to balance the defendant's need for finality with the plaintiff's interest in having his issues and claims fully and fairly litigated.

B. The Various Tests Applied by the United States Circuit Courts.

One such test is the "transactional test," which has been adopted by the Fifth Circuit and others. *See* 82 A.L.R. Fed. 829, § 2, *citing Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984) (additional citations omitted). That test requires an esoteric consideration of whether the facts of both cases are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectation or business understanding or usage. *See* Restatement (Second) of Judgments (1982), § 24. A closely related but slightly different test is one that analyzes whether the "essential" or "operative" facts and issues are the same in both cases. *See id., citing First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000) (other citations omitted).

In contrast, the "same evidence" test focuses on whether the key evidence considered in the first judgment would sustain a judgment in the second case. *See, e.g.*, 82 A.L.R. Fed. 829, § 2, *citing Tucker v. Arthur Anderson & Co.*, 646 F.2d 721 (2d Cir. 1981) (other citations omitted). Some decisions have characterized the "same evidence" test as a negative test, explaining that the absence of the "same evidence" does not necessarily mean there exist

distinct causes of action. *See id., citing Ruskay v. Jensen*, 342 F. Supp. 264 (S.D.N.Y. 1972) (other citations omitted).

Another test, the "right-duty" approach, was considered and rejected by the Seventh Circuit in *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986). In that case, the appellants lobbied, albeit unsuccessfully, for a *res judicata* analysis involving the rights, duties, and injuries addressed by each cause of action.

The "transactional test" has been adopted by at least seven of the thirteen federal circuit courts, and is admittedly the trend in recent decisions. *See* 82 A.L.R. Fed. 829, § 2. Nevertheless, the entire body of cases on the issue remains inconsistent. As stated diplomatically by the court in *Ramirez v. Brooklyn Aids Task Force*, "the test for determining what constitutes the same cause of action has been articulated by the Second Circuit in various ways." 175 F.R.D. 423, 426 (E.D.N.Y. 1997). This important issue clearly requires clarification.

C. The Prior Decision of this Court Addressing the "Same Cause of Action" Question.

This Court has previously recognized the existence of multiple tests but has never settled on a particular one. In *Nevada v. U.S*, the Court commented that the "transactional" test was "a more pragmatic approach" than the "same evidence" test, but it refrained from favoring one over the other. 103 S.Ct. 2906, n.12, 463 U.S. 110, n.12 (1983). Noting that the "[d]efinitions of what constitutes the 'same cause of action' have not remained static over time," the Court found it unnecessary in that particular case "to parse any minute differences which these differing standards might produce" because the result under either

of those tests was the same. 103 S.Ct. at 2918-2919, 463 U.S. at 130-131.

D. The Necessity of a Clear Directive on the "Same Cause of Action" Test.

Yet the distinctions between the various *res judicata* tests can make all the difference in some cases, such as this one. Applying the "transactional test," the Fifth Circuit in this case concluded that both federal causes of action brought by Brennan's Inc. arose from the same transaction, the 1998 Agreement, and therefore found the 2004 lawsuit barred by *res judicata*.

Under the "same evidence test," however, the Fifth Circuit would have considered only whether the same key evidence in the 2000 Lawsuit would be necessary to sustain a judgment in the 2004 Lawsuit. Clearly, the Fifth Circuit would have reached a different conclusion. The key evidence in the 2000 Lawsuit was Dickie Brennan's misrepresentation or concealment of facts during the negotiations of the 1998 Agreement and whether they had complied with the terms of the 1998 Agreement. In contrast, the only evidence in the 2004 Lawsuit, concerning whether or not the 1998 Agreement contained a term of duration, and if not, whether it was terminated pursuant to Article 2024, would be the 1998 Agreement and the August 5, 2004, letter from Brennan's Inc.

E. The Fifth Circuit Erred in Refusing to Distinguish Between a Contractual Right and a Cause of Action.

Of course, even if the "transactional test" is the proper test for resolving the "same cause of action" question in

the *res judicata* context, Brennan's Inc. strongly asserts the Fifth Circuit misapplied it in this particular case. The Fifth Circuit was wrong to conclude there is no distinction between the exercise of a contractual right and the assertion of a cause of action, and the decision represents an illogical and unwarranted expansion of the *res judicata* doctrine.

When Brennan's Inc. sent Dickie Brennan the termination letter of August 5, 2004, it was exercising a continuing contractual right that is inherent in every contract of indefinite duration governed by Louisiana law. *See* La. C.C. art. 2024. Since Brennan's Inc. had not previously effected such a termination, it had no reason or even ability to assert an Article 2024 cause of action for termination in the 2000 Lawsuit. Had it done so, Dickie Brennan would have responded to the cause of action with an exception of prematurity, asserting Brennan's Inc. had failed to properly exercise its Article 2024 rights by sending the requisite termination letter.

In response to Brennan's Inc.'s argument that an Article 2024 termination represents the exercise of a contractual right rather than a cause of action, the Fifth Circuit concluded:

> This distinction is without effect. "*Res judicata* prevents litigation on all grounds for, or defenses to recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."

See App. 2.

The Fifth Circuit's conclusion is clearly wrong. Certainly there is a difference between a cause of action that has accrued during the pendency of the earlier suit, on one

hand, and a contractual right that did not ripen until after the earlier suit was resolved, on the other. In effect, the Fifth Circuit's holding means that if parties to a contract choose to litigate over a past breach, they must be sure to trigger every contractual right or grounds for termination that could ever arise under the contract or under Louisiana law in the future. Otherwise, they risk being forever barred from seeking to exercise those rights with respect to future conduct under the contract.

In this case, the net result of the Fifth Circuit's holding is that Brennan's Inc. is perpetually obligated to hold up its end of the contract, but is forever barred from judicially enforcing any obligations owed by Dickie Brennan. Dickie Brennan can breach the 1998 Agreement with impunity, and simply cry "same cause of action" if any suit for enforcement is brought against them. *Res judicata* cannot mandate such an unfair and irrational conclusion.

The Fifth Circuit clearly erred in finding the 2004 Lawsuit barred by *res judicata*. Brennan's Inc. was not merely "rehashing old battles"; it was exercising a contractual right that it did not exercise and could not have exercised in the first suit.

CONCLUSION

In conclusion, the *res judicata* question is one that is extremely common and important. Practitioners routinely struggle with whether or not certain causes of action must be asserted or barred forever by *res judicata*. Others must advise their clients whether a different cause of action is or is not the "same" cause of action and therefore barred by *res judicata* due to prior litigation. Although the Fifth

Circuit has adopted the "transactional test" for guidance with these questions, other circuit courts have been inconsistent. This Court has never weighed in on the question, but it should do so today.

Moreover, the Court should overturn the Fifth Circuit's decision to the extent it unreasonably expands the *res judicata* doctrine. Certainly, *res judicata* should bar a party from re-litigating a cause of action that was or could have been litigated in a prior suit, but it should not bar a party from later exercising a contractual right if that right had not yet accrued at the time of the prior suit.

Accordingly, the Court should grant writs and resolve the important question of what constitutes the "same" cause of action for *res judicata* purposes. It should also overturn the Fifth Circuit's improper expansion of the *res judicata* doctrine to bar the exercise of contractual rights that could not have been asserted in the earlier suit. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30441
Summary Calendar

BRENNAN'S INC,

Plaintiff-Appellant,

versus

RICHARD J. BRENNAN, JR., DICKIE BRENNAN & COMPANY, INC., COUSINS RESTAURANTS, INC., AND SEVEN SIXTEEN IBERVILLE, L.L.C.

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(USDC No. 2:04-cv-2808)

(Filed October 19, 2005)

Before REAVLEY, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:*[1]

Reviewing the record de novo, we agree with the district court's order and affirm the judgment of dismissal for the following reasons:

1. The 1998 contractual agreement between the parties has been the locus of both the current and previous

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*[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

lawsuits. In the previous lawsuit, the jury did not grant the plaintiff's request to cancel the contract, although it awarded $250,000 in trademark damages. Last year, this court rejected plaintiff's attack upon the contract. *Brennan's Inc. v. Dickie Brennan & Co.*, 376 F.3d 356 (5th Cir. 2004). After the conclusion of the first lawsuit, the plaintiff sent the defendant a contract termination letter specifically implicating Louisiana Civil Code Article 2024. As the district court said, there was no impediment to raising plaintiff's alternative theory of termination under Article 2024 in the first suit.

2. The plaintiff argues an Article 2024 termination represents the exercise of a contractual right rather than a cause of action. This distinction is without effect. "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979). Having failed to raise its Article 2024 argument in the origi l suit on the 1998 contract, the plaintiff is unable to file a new suit for purposes of rehashing old battles.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BRENNAN'S, INC.	**CIVIL ACTION**
VERSUS	**NO. 00-2413**
DICKIE BRENNAN AND CO., INC., *ET* AL.	**SECTION "S" (1)**

JUDGMENT

(Filed Dec. 13, 2002)

This captioned matter came on for trial by jury on October 28, 2002. Brennan's, Inc. was represented by Edward T. Colbert, T. Cy Walker, and William M. Merone of Kenyon & Kenyon, Washington, D.C., and by Leon H. Rittenberg Jr. of Baldwin & Haspel, L.L.C., New Orleans, Louisiana. The defendants, Dickie Brennan & Company, Inc., Cousins Restaurants, Inc., Seven Sixteen Iberville, L.L.C., Richard J. Brennan Jr., and Richard J. Brennan Sr. were represented by Gary J. Elkins, Richard L. Traina and J. Shea Dixon of Elkins, P.L.C., New Orleans, Louisiana.

With the consent of the parties, the trial was bifurcated by the court, with the liability and damages phases being tried separately. After hearing evidence as to liability, and after being instructed by the Court, the jury retired on Wednesday, November 6, 2002 to deliberate. On Thursday, November 7, 2002, the jury returned and rendered its verdict as to liability by answering special jury interrogatories. The jury interrogatory form was duly signed by the presiding juror and, after the reading of the responses to the jury interrogatories, the jurors were polled by the court and each represented that the responses to the jury interrogatories was his or her verdict.

Accordingly, the court hereby enters judgment on the issue of liability in accordance with the jury's responses to the jury interrogatories propounded to it, as follows:

1. Richard J. Brennan Jr. did not fraudulently induce Brennan's to enter into the 1998 Agreement.

2. Richard J. Brennan Jr. breached the 1998 Agreement by using the name "Brennan's" in a manner not authorized by the 1998 Agreement in connection with "Dickie Brennan's Steakhouse" and "Dickie Brennan & Co.," but Richard J. Brennan Jr. did not breach the 1998 Agreement in connection with "Dickie Brennan's Palace Café."

3. There exists a likelihood of confusion inconsistent with the intention of the 1998 Agreement with respect to Richard J. Brennan Jr.'s use of the name "Brennan's."

4. Richard J. Brennan Jr. became aware of a perceived likelihood of confusion or instances of actual confusion as the result of the use made by Brennan's, Inc. and Richard J. Brennan Jr. of their respective marks, but Richard J. Brennan Jr. failed to promptly notify Brennan's, Inc. of such a perceived likelihood of confusion or instances of actual confusion and failed to take prompt and effective measures in full cooperation with Brennan's, Inc. to eliminate such confusion.

5. Richard J. Brennan Jr.'s failure to take prompt and effective measures to eliminate such confusion was not prevented by a lack of cooperation by Brennan's, Inc.

6. Both Richard J. Brennan Jr. and Brennan's, Inc. acted in good faith.

7. Although Richard J. Brennan Jr. breached the 1998 Agreement, the breach is not sufficiently serious to justify dissolution of the 1998 Agreement, and, accordingly, Richard J. Brennan, Jr. is hereby **ORDERED** to specifically perform his obligations under the 1998 Agreement from November 8, 2002, forward.

The jury then heard evidence on November 7 and 8, 2002, with respect to damages. On Friday, November 8, 2002, after being instructed by the Court, the jury retired to deliberate on the issue of damages, after which the jury returned and rendered its verdict as to damages by awarding $250,000 to Brennan's, Inc. as a result of Richard J. Brennan, Jr.'s breach of the 1998 Agreement.

Accordingly, it is the judgment of the court that Richard J. Brennan, Jr. is hereby **ORDERED** to pay the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($250,000), plus interest and costs, to Brennan's, Inc.

Brennan's, Inc. also asserted a claim against Richard J. Brennan Sr. for breach of the 1979 Agreement. After the jury was instructed that the court had ruled prior to trial that Richard J. Brennan Sr. had breached the 1979 Agreement, Brennan's, Inc., through Mr. Rittenberg, represented to the court that Brennan's, Inc. was waiving its claim against Richard J. Brennan Sr. for breach of contract damages, reserving whatever rights it may have to seek attorney's fees from Richard J. Brennan Sr. under the 1979 Agreement through a post-trial motion, and also reserving its right on appeal to argue that Richard J.

Brennan Sr. is liable to Brennan's, Inc. for damages for trademark infringement.

Accordingly, it is **ORDERED** that, although the court ruled that Richard J. Brennan, Sr. breached the 1979 Agreement, Brennan's, Inc.'s claim against Richard J. Brennan, Sr. for breach of contract damages has been waived and is accordingly, **DISMISSED**. It is **FURTHER ORDERED** that Brennan's, Inc.'s right to seek attorney's fees from Richard J. Brennan Sr. under the 1979 Agreement be and it is hereby **RESERVED** and will be determined by the court through post trial motion practice. It is **FURTHER ORDERED** that the right of Brennan's, Inc. to argue on appeal that Richard J. Brennan Sr. is liable to Brennan's Inc. for trademark infringement damages, is **PRESERVED**.

New Orleans, Louisiana this 12th day of December, 2002.

/s/ Mary Ann Vial Lemmon
Mary Ann Vial Lemmon
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BRENNAN'S, INC.	**CIVIL ACTION**
VERSUS	**NO. 04-2808**
RICHARD J. BRENNAN, JR., *ET AL.*	**SECTION "S" (5)**

ORDER AND REASONS

(Filed Apr. 11, 2005)

IT IS ORDERED that defendants' Motion to Dismiss (Document 8) is hereby **GRANTED**.

A. Background.

Plaintiff, Brennan's, Inc., the owner and operator of *Brennan's Restaurant*, holds a federal trademark in "Brennan's" and certain related marks. Defendant, Cousins Restaurants, Inc. owns and operates *Dickie Brennan's Palace Café*, while defendant Seven Sixteen Iberville, L.L.C. owns and operates *Dickie Brennan's Steakhouse*. Defendant Dickie Brennan & Company, Inc., provides marketing and promotional services for these restaurants. Defendant Richard J. Brennan, Jr. is an officer and member of Cousins, Seven Sixteen, and Dickie Brennan & Company.

In this action Brennan's, Inc. has sued defendants (1) for a declaratory judgment that a contract executed by Richard, Jr. dated October 1, 1998, which plaintiff alleges is the only source for Richard, Jr.'s right to use the names *Dickie Brennan's Steakhouse* and *Dickie Brennan's Palace Café*, has been terminated and is no longer in effect; and (2) for injunctive relief against Richard, Jr. under federal

trademark law to prevent his alleged misuse of these names. Defendants have moved to dismiss Brennan's, Inc's suit based on the doctrine of *res judicata*. In order to understand the context of this motion, it is necessary to detail a prior suit involving the parties.

1. The prior suit: *Brennan's, Inc., et al. v. Dickie Brennan & Co., Inc., et al.*, Case No. 00-2413.

On August 15, 2000, Brennan's, Inc. and its principals[1] filed Case No. 00-2413 against the current defendants and Richard J. Brennan, Sr., asserting claims for federal trademark dilution, trademark infringement, unfair competition, false representation, false designation of origin, and related state law causes of action against defendants, generally alleging that defendants' use of the names *Dickie Brennan's Steakhouse* and *Dickie Brennan's Palace Café* in connection with restaurant services violated federal and state law. Brennan's, Inc. alleged that the operation of the two restaurants had caused and was likely to cause confusion among consumers.[2] The prior suit expressly sought termination of a contract between Brennan's, Inc. and Richard, Jr. dated October 1, 1998 (the "1998 Agreement") based on a breach thereof.

Under the 1998 Agreement, Brennan's, Inc. agreed not to "object to the operation by Richard Brennan, Jr. of restaurants under the name and marks DICKIE BRENNAN'S PALACE CAFÉ and DICKIE BRENNAN'S

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[1] Owen E. Brennan, Jr., James C. Brennan, and Theodore M. Brennan.

[2] Case No. 00-2413, Document 20, at ¶¶ 31, 43.

STEAKHOUSE, or under other names which may be opened in the future, so long as:"

> 1. The use of BRENNAN'S by Richard Brennan Jr. shall always be accompanied by the name DICKIE and the term BRENNAN'S shall not be of greater size or prominence than the name DICKIE, and shall be arranged so as to present a combined name of DICKIE BRENNAN'S, as proprietor;
>
> 2. The use of DICKIE BRENNAN'S shall be used in conjunction with the remaining portions of the names and marks so as to present a unified name and mark, such as DICKIE BRENNAN'S PALACE CAFÉ and DICKIE BRENNAN'S STEAKHOUSE, and the name DICKIE BRENNAN'S shall not be of greater size or prominence than the remaining portion of the restaurant name;
>
> 3. The names and service marks of Richard Brennan identified as being permitted hereunder shall not appear in script style; except as shown on Exhibit "A" attached hereto; and
>
> 4. No connection is made, promoted, or suggested between any restaurant operated by Richard Brennan Jr. and any restaurant operated under a name or mark owned or licensed by Brennan's Inc., including but not limited to those identified above. By way of example but not limitation, use by Richard Brennan Jr. of terminology such as "original" or "famous" would imply such a connection.

In addition to these four numbered limitations, the 1998 Agreement provided that:

> In the event Richard Brennan Jr. becomes aware of any perceived likelihood of confusion or any instance of actual confusion as the result of the use made by each party of their respective marks, Richard Brennan Jr. shall promptly notify Brennan's Inc., and take prompt and effective measures, in full cooperation with Brennan's Inc., to eliminate such confusion.
>
> The rights granted hereunder are personal to Richard Brennan Jr. and may not be assigned, licensed or otherwise encumbered without prior consent of Brennan's, Inc., except that they may be assigned to the heirs hereto.

Case No. 00-2413 was tried to a jury from October 29 to November 8, 2002. The jury had to resolve the issue whether Richard, Jr. breached the 1998 Agreement. If so, the jury had to determine whether the breach was sufficiently serious to dissolve the contract. On November 7, 2002, the jury rendered its verdict, finding that Richard, Jr.'s use of the term "Brennan's" in connection with *Dickie Brennan's Steakhouse* and Dickie Brennan and Co., Inc. breached the 1998 Agreement and awarding damages incurred because of the breach up to the time of the trial.[3]

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[3] The jury interrogatories asked:

Do you find by a preponderance of the evidence that Richard Brennan, Jr. breached the 1998 Agreement by using the name Brennan's in a manner not authorized by the 1998 Agreement?

a. In connection with Dickie Brennan's Steak House

_x_ Yes ___ No

b. In connection with Dickie Brennan's Palace Café

___ Yes _x_ No

c. In connection with Dickie Brennan and Co.

_x_ Yes ___ No

(Continued on following page)

However, the jury determined that the breach was not serious enough to warrant dissolution of the contract, and could be remedied by requiring Richard, Jr. to specifically perform his obligations under the 1998 Agreement.[4]

On December 13, 2002, the court entered a final judgment in Case No. 00-2413 in accordance with the jury's verdict, stating in part:

> 2. Richard J. Brennan, Jr. breached the 1998 Agreement by using the name "Brennan's" in a manner not authorized by the 1998 Agreement in connection with "Dickie Brennan's Steakhouse" and "Dickie Brennan & Co.," but Richard J. Brennan, Jr. did not breach the 1998 Agreement in connection with "Dickie Brennan's Palace Café."
>
> * * *
>
> 7. Although Richard J. Brennan, Jr. breached the 1998 Agreement, the breach is not sufficiently serious to justify dissolution of the 1998 Agreement, and, accordingly, Richard J. Brennan, Jr. is hereby **ORDERED** to specifically perform his

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See Case No. 00-2413, "Jury Interrogatories" No. 2 (attached to Document 293).

[4] The jury interrogatories asked further:

If you have found that Richard Brennan, Jr. breached the agreement . . . which of the following do you find:

___ a. That the type of breach is sufficiently serious to justify dissolution of the 1998 Agreement.

_x_ b. That the type of breach can be remedied by requiring Richard Brennan, Jr. to specifically perform the obligations under the 1998 Agreement from this date forward.

See Case No. 00-2413, "Jury Interrogatories" No. 4 (attached to Document 293).

obligations under the 1998 Agreement from November 8, 2002 forward. [5]

2. The current suit.

In the current suit plaintiff Brennan's, Inc. has sued Richard, Jr., Dickie Brennan & Co., Cousins, and Seven Sixteen for a declaratory judgment and injunctive relief. Brennan's, Inc. alleges that the 1998 Agreement "has no term," and therefore "can be terminated by any party thereto upon reasonable notice" pursuant to Civil Code article 2024.[6] Brennan's, Inc. alleges:

> On August 5, 2004, Brennan's Inc. served notice on Richard J. Brennan, Jr. that it had elected to terminate the 1998 contract pursuant to Louisiana law, and that Richard J. Brennan, Jr. had 60 days notice of such termination. Richard J. Brennan, Jr. was further informed that as of 60 days from the date of said termination notice, or as of October 5, 2004, he was instructed to cease using the name Brennan's in connection with any restaurant operation, inasmuch as the 1998 Agreement would not longer be in force.[7]

The August 5, 2004 letter states, in its entirety:

> Reference is made to the Agreement between you and Brennan's, Inc., signed by you on or about November 16, 1998 (the "Agreement"). On behalf of Brennan's, Inc., you are hereby notified that said Agreement is terminated. Please be

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[5] Case No. 00-2413, Document 303.

[6] Complaint at ¶ 15.

[7] *Id.* at ¶ 16.

> advised that as of October 5, 2004, or sixty (60) days from the date of this letter, any use by you, or by any person acting on your behalf, or by any legal entity in which you have any interest, of the trademarks referenced in the Agreement, including but not limited to the service mark "Brennan's" in connection with operation of any restaurant or other business, on any advertising, or on any other printed material, will be a violation of those trademarks.
>
> While Brennan's Inc. believes you are in breach of the Agreement, this termination notice is specifically not based on any such breach. Rather, this termination is based upon Louisiana Civil Code Article 2024, inasmuch as the Agreement is of indefinite duration. Brennan's Inc. specifically hereby reserves its right to ask the appropriate court to terminate the Agreement for the additional reason that you continue to breach the Agreement in violation of the December 12, 2002 Judgment of the United States District Court for the Eastern District of Louisiana, Case No. 00-2413.

Brennan's, Inc. alleges, and Richard, Jr. does not dispute, that "[n]otwithstanding the notice given to Richard J. Brennan, Jr. to cease use of the Brennan's trademark, he has ignored Brennan's Inc.'s termination notice and continues to use the name Brennan's in connection with restaurant operations."[8] Count One of the Complaint seeks a judgment declaring that the termination letter "was effective to cause the dissolution of the 1998 Agreement and that it is therefore no longer effective, as of that

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[8] *Id.* at ¶ 17.

date."[9] Count Two seeks injunctive relief to prevent Richard, Jr.'s violation of plaintiff's trademark rights.[10]

B. Analysis.

Defendants argue that the current suit is barred by the *res judicata* effect of the final judgment in Case No. 00-2413. Federal law "determine[s] the preclusive effect of a federal judgment, even if that judgment was based on state law." *Mowbray v. Cameron County, Texas*, 274 F.3d 269, 281 (5th Cir. 2001), *cert. denied*, 535 U.S. 1055, 122 S.Ct. 1912, 152 L.Ed.2d 822 (2002).

The Fifth Circuit has recognized that *res judicata* "bars all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication." *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 312-13 (5th Cir. 2004) (italics in original). The test for *res judicata* has four elements: (1) the parties must be identical or in privity, (2) the judgment in the prior action must have been rendered by a court of competent jurisdiction, (3) the prior action must have been concluded by a final judgment on the merits, and (4) the same claim or cause of action must be involved in both suits. *Id.* Brennan's, Inc. disputes whether this suit involves the same claim or cause of action as Case No. 00-2413.

In determining whether two suits involve the same claim, the Fifth Circuit has adopted the transactional test of the *Restatement (Second) of Judgments. Matter of Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999), *cert.*

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[9] *Id.* at ¶ 20.

[10] *Id.* at ¶ 21.

denied, 527 U.S. 1004, 119 S.Ct. 2339, 144 L.Ed.2d 236 (1999). Under this test:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgements, § 24 (1982). In determining the scope of the relevant transaction:

> "Transactions may be single despite different harms, substantive theories, measures or kinds of relief. . . . That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would call for different measures of liability or different kinds of relief."

Matter of Interlogic Trace, Inc., 200 F.3d 382, 386 n. 3 (5th Cir. 2000) (quoting *Restatement (Second) of Judgments* § 24, comment c. (1982)). "One major function of claim

preclusion is to force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the first suit." 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 4408, at 185 (2002). It is therefore "clear" under the transactional test that "a mere change in legal theory does not create a new cause of action." *Id.* § 4407, at 179; *see also* 18 James W. Moore, *Moore's Federal Practice* § 131.21[3][a], at 131-43-44 (3rd ed. 2004) ("[A] claim is coterminous with a transaction or series of transactions, regardless of the number of different legal theories that may arise as a result of plaintiff's alleged damages. . . . The fact that plaintiff's counsel in the first action didn't happen to think of the theory advanced in the second action will also fail to avoid preclusion.").[11]

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[11] These principles are also in accord with Louisiana *res judicata* law, which provides that if a judgment is rendered in favor of a defendant, "all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action." LSA-R.S. 13:4231(2). The Official Comment to the 1990 revision of this provision states:

> Under present law a second action would be barred by the defense of res judicata only when the plaintiff seeks the same relief based on the same cause or grounds. This interpretation of res judicata is too narrow to fully implement the purpose of res judicata which is to foster judicial efficiency and also to protect the defendant from multiple lawsuits. For example, in *Mitchell v. Bertolla*, 340 So.2d 287 (La.1976), the plaintiff sued unsuccessfully to rescind the lease for lesion beyond moiety and nonpayment of the rent, and then sued to rescind the same lease for fraud. The supreme court held that the second action was not barred by res judicata because it was based on a different cause (the legal principle upon which the demand is based). Under new R.S. 13:4231, the second action would be barred because it arises out of the occurrence which was the subject matter of the first action.

(Continued on following page)

The court finds that plaintiff's claim that the 1998 Agreement is terminable at will under Article 2024 of the Louisiana Civil Code is barred by *res judicata*. Case No. 00-2413 involved the claim that the 1998 Agreement should be terminated. The only grounds asserted for termination was Richard, Jr.'s breach.

In the current suit, plaintiff has changed theories, and now argues that the 1998 Agreement should be terminated because the agreement was terminable at will pursuant to Article 2024, grounds that were in existence at the time of the first suit. Under the *Restatement's* transactional test, "a contract is generally considered to be a single transaction for purposes of claim preclusion." 18 *Moore's Federal Practice* § 131.23, at 131-61. This principle is illustrated in the *Restatement*:

> A brings an action against B for the cancellation of a contract made with B, alleging that the contract was procured by the undue influence and fraud of B. After verdict and judgment for B, A brings a new action for the cancellation of the contract, alleging mental incompetency of A. The prior judgment is a bar.

Restatement (Second) of Judgments, § 25, Illustration 7. There was no impediment to raising plaintiff's alternative theory of termination under Article 2024 in the first suit. Plaintiff argues that "Brennan's could not have asked for the same declaratory relief it seeks herein in connection

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Although Louisiana law is not at issue in the case, Louisiana res judicata law (LSA-R.S.13:4231) "was broadened by the 1990 amendment and is now in line with federal provisions." *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.*, 880 So.2d 129, 142 (La.App. 1st Cir.2004), *writ denied*, 893 So.2d 72 (La. 2005).

with the 2000 litigation, because this case is entirely based on occurrences since the date of the judgment in the 2000 litigation."[12] However, the only such "occurrence" identified by plaintiff is the notification of termination in the letter on August 5, 2004. Plaintiff had the unilateral ability of providing such notice of termination prior to or during the first litigation, thereby satisfying the only precondition to asserting its alternative theory of termination.[13]

The "pragmatic" factors used in applying the transactional test demonstrate the identity of plaintiff's claims in the two suits. Both claims are related in origin and motivation because both originate in and are motivated by Brennan's, Inc.'s quest to prevent Richard, Jr. from using the term "Brennan's." The two claims form part of a

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[12] Document 13, at p. 3.

[13] Wright, Miller, and Cooper recognize that "[a] single transaction may support demands for relief based on two or more theories, one of which is not ripe or is subject to a precondition while another is ripe and not subject to the precondition," and indicate that:

> There is much to be said for requiring the plaintiff to inform the court of the theories that are not yet eligible for litigation, and to argue the need for immediate action on the theory that is eligible for present disposition. The court then can determine whether there is good reason to proceed to dispose of the theory that is ready for disposition, or whether it is better to stay proceedings until all matters can be resolved at once.

18 *Federal Practice and Procedure* § 4412, at 312. Several courts have held that a plaintiff may not split a claim by litigating a discrimination suit under state law to judgment and later asserting a federal claim arising out of the same transaction after obtaining a "right to sue" letter. *E.g., Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1187 (11th Cir.), *cert. denied*, 540 U.S. 1016, 124 S.Ct. 568, 157 L.Ed.2d 430 (2003). Even though the "right to sue" letter is a precondition of the federal claim that was unsatisfied at the time of the first judgment, the judgment is *res judicata* to the assertion of the subsequent federal claim. *Id.*

convenient trial unit, and could easily have been litigated together in the first suit. There was no reason for defendants to believe during the extensive prior litigation that they would face additional efforts to terminate the 1998 Agreement.

Res judicata is a "salutary" principle that "serves vital public interests." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Supreme Court has recognized that "'public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.'" *Id.; see also Jackson v. F.I.E. Corp.*, 302 F.3d 515, 529 (5th Cir. 2002) (*res judicata* protects "private and public values" such as "repose, finality, and efficiency"). The time for Brennan's, Inc. to litigate whether the 1998 Agreement was terminable at will under Article 2024 was in the prior suit in which it sought to terminate the agreement based on a breach thereof. Brennan's, Inc. is now barred by *res judicata* from seeking to terminate the agreement in a new suit based on a new theory.

C. Conclusion.

Defendants' motion to dismiss is granted.[14]

New Orleans, Louisiana this 11 day of April, 2005.

/s/ Mary Ann Vial Lemmon
Mary Ann Vial Lemmon
United States District Judge

[14] At oral argument on defendants' motion, counsel for Brennan's, Inc. represented that Brennan's, Inc. is not asserting a claim for breach of the 1998 Agreement. The only claims brought by Brennan's, Inc. in this suit are (1) for a judicial declaration that the 1998 Agreement was terminable at will under Article 2024 of the Louisiana Civil Code, and (2) for injunctive relief to prevent the violation of its trademarks. The court's ruling that Brennan's, Inc.'s claim for declaratory judgment is barred by *res judicata* results in the dismissal of both claims.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BRENNAN'S, INC.	**CIVIL ACTION**
VERSUS	**NO. 04-2808**
RICHARD J. BRENNAN JR., *ET AL.*	**SECTION "S" (5)**

JUDGMENT

(Filed Apr. 11, 2005)

Considering the court's Order and Reasons of April 11, 2005,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants Richard J. Brennan, Jr., Dickie Brennan & Company, Inc., Cousins Restaurants, Inc., and Seven Sixteen Iberville, L.L.C. and against plaintiff Brennan's, Inc. dismissing plaintiff's claims with prejudice.

New Orleans, Louisiana this 11 day of April 2005.

/s/ Mary Ann Vial Lemmon
Mary Ann Vial Lemmon
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30441

BRENNAN'S INC

Plaintiff-Appellant

v.

RICHARD J BRENNAN, JR; DICKIE BRENNAN & COMPANY INC; COUSINS RESTAURANTS INC; SEVEN SIXTEEN IBERVILLE LLC

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Filed Nov. 17, 2005)

(Opinion 10/19/05, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit
Judge

(2)

No. 05-1040

In The Supreme Court of the United States

BRENNAN'S, INC.,

Petitioner,

v.

RICHARD J. BRENNAN, JR., DICKIE BRENNAN & COMPANY, INC., COUSINS RESTAURANTS, INC. AND SEVEN SIXTEEN IBERVILLE, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Respondents have no objection to the first question presented by Petitioner.

(2) If the proper test for application of federal *res judicata* principles is the "transactional" test, is a party that brings an action against another to terminate a contract forever barred from bringing a subsequent action seeking to terminate that same contract on the basis of an alternative ground for termination that could have, and should have, been raised at the time of the first action, but which was not so asserted?

CORPORATE DISCLOSURE STATEMENT

Plaintiff-petitioner, Brennan's, Inc., does not have a parent company, and there is no publicly held company that owns more than 10% of its stock. Defendant-respondent, Richard J. Brennan, Jr. is an individual. None of defendants-respondents, Dickie Brennan & Company, Inc., Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. have parent companies, nor is there any publicly held company that owns more than 10% of any of their stock or membership interests, as the case may be.

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JURISDICTION

Petitioner has failed to demonstrate an adequate basis for this Court to exercise its discretionary jurisdiction under Rule 10 of the Rules of this Court, for the reasons that (i) Petitioner has failed to establish a conflict between the courts of appeals with respect to the issues presented, as required by Rule 10(a), and (ii) Petitioner has failed to present an important question of federal law that has not previously been settled by this Court, as required by Rule 10(c), all as more fully discussed in Sections A and B hereinafter.

INTRODUCTION

Claim splitting and piecemeal litigation have never been favored by this Court. As early as 1877, this Court had held that:

> '[It is undoubtedly a settled principle that a] party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.'

Baltimore Steamship Company, et al., v. Phillips, 274 U.S. 316, 320 (1927) (*quoting Stark v. Starr*, 94 U.S. 477, 485 (1877)).

In the matter now before this Court, Petitioner, Brennan's, Inc. ("Brennan's"), did exactly what this Court, in the quoted passage, has expressly proscribed. In 2000, Brennan's filed a lawsuit referred to hereinafter as "*Brennan I*," seeking the termination, on several grounds, of a contract that it had entered into with Respondent, Richard J. Brennan, Jr. ("Dickie") in 1998 (the "1998 Agreement"). In 2004, after the entry of a final judgment rejecting Brennan's efforts to terminate the 1998 Agreement, it simply filed the current lawsuit, referred to hereinafter as "*Brennan II*", seeking the same relief that it had sought in the first – *i.e.*, termination of the 1998 Agreement -- on an alternative ground that was available to it at the time of the first action, but which was not asserted.

The Fifth Circuit saw the current lawsuit for exactly what it is – nothing more than an attempt to "rehash old battles"[1] over the family surname. The conflict began, not in 2000 with the filing of *Brennan I*, but in 1976, when Brennan's and its owners filed a similar lawsuit against their uncle, Richard J. Brennan, Sr. ("Richard, Sr."), Dickie's father, other family members, and the restaurant companies owned by them.[2] To settle that litigation,

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[1] *See* Opinion of U.S. Fifth Circuit Court of Appeals in *Brennan's, Inc. v. Richard J. Brennan, Jr., et al.*, 05-30411 (5th Cir. 2005) (*per curiam*), appearing in the Appendix to Brennan's Petition for Writ of Certiorari (hereinafter, the "Petition"), pp. 1-2.

[2] "Brennan's Restaurant" on Royal Street in New Orleans was founded by Owen E. Brennan, the father of the three brothers who currently own Brennan's (the "Brothers"), and the brother of Dickie's father, Richard, Sr. Owen E. died in late 1955, after which, the restaurant continued under the management of Owen E.'s siblings, including Richard, Sr., and the Brothers. Other restaurant holdings were also acquired by the family. In 1974, the family restructured their restaurant businesses and the Brothers became sole owners of Brennan's

(Continued on following page)

Brennan's, the Brothers and their mother, on the one hand, and Richard, Sr., his siblings and their restaurant companies, on the other, entered into a settlement agreement in 1979, pursuant to which Brennan's received the right to use the federally registered trademark, "Brennan's," in connection with restaurant services in Louisiana.

In the fall of 1998, the Brothers became aware that their cousin, Dickie, was preparing to open a restaurant in New Orleans by the name of "Dickie Brennan's Steakhouse." Subsequently, they arranged a meeting with Dickie, at which they asked Dickie to execute the 1998 Agreement, which provided that Brennan's would not object to Dickie's use of his name in connection with his restaurant operations, so long as certain conditions specified in the 1998 Agreement were met. Although he did not believe that he needed Brennan's permission to use his own name on his restaurants, Dickie agreed to sign the 1998 Agreement in the hope that his gesture might be a step toward mending damaged relationships among members of the different branches of the family. Just over a year after signing the 1998 Agreement, Brennan's filed *Brennan I* in an attempt to terminate the 1998 Agreement. Dickie now operates three New Orleans restaurants that use "Dickie Brennan's" as part of their names, as expressly permitted by the 1998 Agreement.

Brennan I, apparently, advanced every available theory for termination of the 1998 Agreement, except the one

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Restaurant. The 1976 suit was captioned *Brennan's Inc. v. Brennan's Restaurants, Inc., et al.*, No. 76-1535 "F" on the docket of the United States District Court for the Eastern District of Louisiana.

asserted in the current suit. It is black-letter law, however, that "a final judgment on the merits of an action precludes the parties or their privies from relitigating [claims] that were *or could have been raised in that action.*" *Federated Department Stores, Inc., et al. v. Moitie*, 452 U.S. 394, 399 (1981), (*citing Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877)). As will be demonstrated, the grounds asserted in this action for termination existed at the time Brennan's filed and tried its first termination suit and, accordingly, as the district court and court of appeals held, this action is barred by the application of the principles of *res judicata* – whether by application of the "transactional" test utilized by the Fifth Circuit, or the "same evidence" test advocated by Brennan's herein.

STATEMENT OF THE CASE

Before the Court is the issue of whether the second of two federal court lawsuits filed by Brennan's against the Dickie Brennan Group to terminate the 1998 Agreement involves the "same cause of action" for purposes of *res judicata* and is, therefore, barred. The first suit, which will be referred to hereinafter as, *Brennan I*, was filed in the United States District Court for the Eastern District of Louisiana on August 15, 2000.[3] Therein, Brennan's asserted federal claims for trademark infringement, unfair competition, false representation, false designation of

[3] The case was styled, *Brennan's Inc., et al. v. Dickie Brennan & Company, Inc., et al.*, No. 00-2413 on the docket of the United States District Court for the Eastern District of Louisiana, *aff'd. in part, rev'd. in part and remanded*, 376 F.3d 356 (5th Cir. 2004).